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No. 1669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

JIMMIE'S INCORPORATED AND JIMMIE'S REALTY CORPORATION OF WEST HAVEN, INCORPORATED

Petitioners

vs.

THE CITY OF WEST HAVEN AND THE WEST HAVEN REDEVELOPMENT AGENCY

Respondents

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

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For the Second Circuit

TO: THE HONORABLE, THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

The petitioners, Jimmie's Incorporated and Jimmie's Realty Corporation of West Haven, Incorporated, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered in these proceedings on January 18, 1971.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, as yet unreported, appears at Appendix A, infra, pp. 10 - 14. Petitioners' Petition for Rehearing to the Court of Appeals was denied without opinion on February 16, 1971. The judgment of the United States District Court for the District of Connecticut is as yet unreported and appears at Appendix B, infra, p. 15. The opinion of the District Court is set forth in its Ruling on Motion to Dismiss and appears at Appendix C, infra, pp. 16 - 20.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 18, 1971. See Appendix A. p. 10. infra. Petition for Rehearing filed timely was denied by the Court of Appeals on February 16, 1971. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The Petitioners commenced an action in the United States District Court for the District of Connecticut alleging a taking of their property without just compensation or due process of law and sought injunctive relief and damages. The questions thereby arising are:

(1) Whether the Court of Appeals erred in finding that the petitioners had failed to show that the defendants' acts amounted to an unconstitutional taking of their property when such finding was based, not upon a hearing on the merits of the petitioners' claims, but upon evidence presented at a summary hearing on petitioners' motion for preliminary injunction.

(2) Whether the petitioners had invoked federal jurisdiction sufficiently to warrant a hearing on the merits of their case by alleging a matter in controversy in excess of $10,000, arising under the Fifth and Fourteenth Amendments, and

specific acts of the respondents causing a substantial devaulation of and interference with the petitioners' real property.

(3) Whether the action of the Court of Appeals for the Second Circuit in (a) remanding the case to the District Court with directions to vacate that part of the judgment which continued in effect the preliminary injunction entered in this case, and (b) affirming the judgment of the District Court dismissing the complaint without affording the petitioners an opportunity to present the merits of their case is consistent with the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V, provides in pertinent part as follows:

> "nor shall private property be taken for public use, without just compensation".

Constitution of the United States, Amendment XIV, Section 1, provides in pertinent part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1331(a) provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

The petitioners are the owners of property in the City of West Haven located within an urban renewal area known as Savin Rock Urban Renewal Project No. 2. Jimmie's Incorporated operates a sea food and hot dog restaurant business and

owns a parcel of land, portions of which parcel are improved by buildings and facilities leased to various amusement oriented enterprises. Jimmie's Realty Corporation owns property across a street from the aforesaid premises improved by a restaurant building.

In June, 1960 the City of West Haven and its Redevelopment Agency commenced the planning of the said urban renewal project. After public debate and hearings an urban renewal plan was adopted in June, 1966, calling for the acquisition of all of the petitioners' property. During the period from June, 1960 until December 12, 1969, the date of the district court's preliminary injunction in this matter, the respondents caused a substantial devaluation to both petitioners' properties by removing tenants, discouraging improvement or development of the properties, demolishing surrounding buildings, warning the public of the imminent acquisition of the petitioners' property, by tearing up abutting public roads and causing public traffic to pass through petitioners' property. During that period and until the present time, the respondents have refrained from formally acquiring the remaining portions of said properties by eminent domain under the applicable Connecticut statutes.

On October 31, 1969 the petitioners filed their complaint in the United States District Court for the District of Connecticut alleging a federal question under the Fifth and Fourteenth Amendments of the United States Constitution and a matter in controversy in excess of $10,000. The complaint specified the acts complained of and alleged a taking of property without just compensation and without due process of law. The complaint sought preliminary and permanent injunctive relief and $1,000,000 damages.

On November 24, 1969 hearing was held on the petitioners' motion for preliminary injunction before the District Court. After hearing a portion of the evidence the petitioners intended to produce, the district judge stopped the proceeding and indicated a willingness to grant a preliminary injunction. The court urged the parties to agree upon and draft a preliminary injunction order. On December 12, 1969, without further hearing, the preliminary injunction order prepared

by the parties was issued.

Thereafter, the district court ruled upon the respondents' motion to dismiss for lack of jurisdiction by dismissing the petitioners' claim for damages while retaining in effect the preliminary injunction. From that order the petitioners appealed to the Court of Appeals, Second Circuit.

The Court of Appeals found that the facts "alleged and shown . . . fall short of establishing a taking of sufficient dimension to justify the federal court in acting upon the complaint". The court found the decline in property value in cases where federal courts had found takings to be "distinguishable since the decline in property value in these cases was much greater than in the instant case".

The petitioners filed a petition for rehearing with the Court of Appeals, asserting a misapprehension by the court that the summary hearing had actually been a hearing on the merits. Their petition was denied.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION BELOW CONFLICTS WITH THE DUE PROCESS PRINCIPLES ENUNCIATED IN THIS COURT'S RULINGS IN GULLY V. FIRST NATIONAL BANK AND BELL V. HOOD.

In **Gully v. First National Bank,** 299 U.S. 109 this Court held that in determining whether or not a case arises under the Constitution or laws of the United States so as to confer jurisdiction upon the district court, the test to be applied is whether a right or immunity created thereby is an essential element of the plaintiff's case, which right or immunity would be supported if the Constitution or laws are given one construction and defeated if they receive another, and the controversy must be disclosed upon the face of the complaint.

In the instant case the petitioners claim the right under

the Fifth and Fourteenth Amendments to the United States Constitution not to be deprived of their property without due process of law and the right to just compensation for property already taken from them by inverse condemnation. If the Fifth and Fourteenth Amendments are so construed they support their claims. If they are not so construed their claims are defeated. Applying the **Gully** test to the instant case, the district court should have assumed jurisdiction under 28 U.S. Code § 1331 and decided the case on its merits.

In **Bell v. Hood,** 327 U.S. 678 this court decided that it is for the party bringing a suit to decide what law he will rely upon. Where the complaint is so drawn as to seek recovery under the Constitution or laws of the United States, the federal court but for two possible exceptions must entertain the suit. The exceptions are when immaterial or wholly insubstantial and frivolous claims are made.

Neither the Court of Appeals nor the District Court found the allegations of the complaint to be immaterial or wholly insubstantial or frivolous. Both courts based their rulings upon the failure of the petitioners to support their allegations, ignoring the fact that petitioners never had the opportunity to present evidence on the merits. In its ruling (Appendix C, infra, p. 17) the district court stated "the facts alleged in the complaint might be adequate to support the conclusory allegation that there was a taking of plaintiff's property without payment of just compensation therefor in contravention of the Fifth Amendment to present a sufficiently substantial federal question to support jurisdiction under 28 U.S.C. § 1331." However, the court concluded that since a preliminary injunction issued the "plaintiffs no longer seek 'just compensation' for the taking of their property" but rather damages in tort. This conclusion was based on the court's determination that the acts of the city had not yet ripened into a taking.

The petitioners have alleged and are prepared to prove that the illegal acts of the respondents had ripened into a taking of property prior to the issuance of the injunction. The essential nature of the taking was the substantial devaluation suffered by the petitioners' properties and their inability to

put them to their highest and best use as a result of the respondents' willful and abusive acts. For these takings the petitioners seek just compensation. Unless this court grants certiorari and remands to the district court for trial the petitioners will be denied just compensation for their property to the extent that it has been wrongfully diminished in value by the respondents, for it is the law of Connecticut that when the respondents acquire the petitioners' properties in accordance with the urban renewal plan as they intended to do, they will acquire the properties at their fair market value as of the date of taking. **Research Associates, Inc. v. New Haven Redevelopment Agency** (1964), 152 Conn. 137.

To paraphrase Justice Black's language in **Bell**; whether or not the complaint as drafted states a cause of action in tort actionable under state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fifth and Fourteenth Amendments. The district court must therefore assume jurisdiction to decide the cause of action.

The only way that a determination can be made of whether the petitioners had any rights which the city was bound to respect can only be decided by the district court taking jurisdiction of the case and hearing the merits of the case. **Mosher v. City of Phoenix**, 287 U.S. 29, 32.

To deny the petitioners the opportunity to present their case after they have made allegations sufficient to invoke federal jurisdiction is to deny to them due process of law and just compensation for property taken from them by the respondents' acts.

2.

THE DECISION BELOW IS FOUNDED UPON A MISAPPREHENSION OF FACT OR LAW.

The judgment of the Court of Appeals rest upon the assumption that a full hearing on the merits had been afforded the petitioners when in fact no opportunity to present evidence on the merits was available to the petitioners.

The preliminary injunction hearing resulting in the preliminary injunction of December 12, 1969 was a summary proceeding limited in scope to the question of whether or not petitioners were entitled to preliminary relief to preserve the status quo pending a determination on the merits of the case. **Public Service Commission of Wisconsin v. Wisconsin Telephone Co.**, 289 U.S. 67, 70. It was not a hearing in which the application for preliminary injunction was consolidated with a trial on the merits in accordance with Rule 65(2) F.R.C.P.

Under these circumstances the hearing could provide no basis for a final determination of the merits of the petitioners' claims. **Public Service Commission of Wisconsin v. Wisconsin Telephone Co.**, id; **Detroit Football Co. v. Robinson** (7th Cir. 1960) 283 F.2d 657; **Virginia Automotive Ltd. v. Conair Corp.** (4th Cir. 1968), 393 F. 2d 126; **Selchow & Richter Co. v. Western Printing & Lithography Co.** (7th Cir. 1940), 112 F. 2d 430.

The petitioners were unable to complete their presentation of evidence before the court expressed its willingness to enjoin the further illegal acts of the respondents.

Despite the summary nature of the proceeding on preliminary injunction the Court of Appeals found a failure of petitioners' proof to support their allegations. The court found that the facts alleged "and shown" fall short of establishing a taking "of sufficient dimension" to justify federal jurisdiction. In a footnote the court distinguished the instant facts from those in the **Foster** cases (**Foster v. Detroit** (E. D. Mich. 1966), 254 F. Supp. 655; **Foster v. Detroit** (6th Cir. 1968), 405 F. 2d 138; **Foster v. Herley** (6th Cir. 1962), 207 F. Supp. 71) by explaining that the decline in property value in those cases was "much greater than in the instant case"; yet no evidence on the extent of decline in property value was offered at the hearing.

The dismissal of the petitioners' complaint based upon a partial presentation of evidence at a preliminary injunction hearing denies the petitioners a full and fair hearing on the merits and consequently due process of law as guaranteed by the Fifth Amendment.

3.

THE DETERMINATION BELOW ON THE ISSUE OF THE CONSTITUTIONAL TAKING IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

The decision of the Court of Appeals and the District Court that there has not been alleged and proven a constitutional taking of the petitioners' property is inconsistent with the decisions of this Court in **United States v. Kress**, 243 U.S. 316; **United States v. General Motors Corp.**, 323 U.S. 373; **Kimball Laundry Company v. U.S.**, 388 U.S. 1; and **U.S. v. Causby**, 328 U.S. 256. These cases have established the principal that it is the character of the invasion that is determinative of the question of whether or not a constitutional taking has occurred, and not the amount of damages resulting from the acts complained of so long as the damage is substantial. Direct interference with the use and enjoyment of land as well as its diminution in value were held to constitute takings under the Fifth Amendment for which just compensation was due.

Other federal courts have followed the precedent set by this Court in circumstances similar to the factual situation of the instant case. Notably in **Foster v. Herley**, (6th Cir. 1964), 330 F. 2d 87; **Foster v. Detroit**, (6th Cir. 1968), 405 F. 2d 138; and **Sayre v. United States** (N.D. Ohio 1967), 282 F. Supp. 175, the courts dealt with situations where urban renewal and redevelopment programs of the cities of Detroit and Cleveland caused diminution in value of the plaintiffs' properties, interference with the plaintiffs' tenants and the use and enjoyment of their property. The acts complained of were either intentional or due to long delays in the acquisition process. The courts held that there was no necessity to allege and prove an actual physical invasion of the property or passage of title to the municipal agency to lay the foundation for claims of just compensation and injunctive relief based upon a constitutional taking of property so as to require the assumption of jurisdiction by the District Court to determine the merits of the case. See also **Portsmouth Harbor Land, etc. Co., v. U.S.**, 260 U.S. 327.

The requirement of the Fifth Amendment to the United States Constitution that all persons shall be accorded due process of law is violated by the circumstances of this case where the petitioners were denied the opportunity of a full and fair hearing on the merits of their case. The phrase "due process of law" would seem to include by reasonable implication the right to equal protection of the laws. **Sims v. Rives** (C.A.D.C. 1936) 84 F. 2d 871, cert. den. 298 U.S. 682. Equal protection of the laws will be denied to the petitioners if their right to maintain this action is denied in the Second Circuit while such right would be secure in other federal jurisdictions.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully Submitted,

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Counsel for Petitioners

Appendix A

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 228 — September Term, 1970.

(Argued November 13, 1970 Decided January 18, 1971.)

Docket No. 34900

JIMMIE'S INCORPORATED AND JIMMIE'S REALTY CORPORATION OF WEST HAVEN, INCORPORATED,

Plaintiffs-Appellants,

v.

THE CITY OF WEST HAVEN AND THE WEST HAVEN REDEVELOPMENT AGENCY,

Defendant-Appellees.

Before:

LUMBARD, **Chief Judge,** and
SMITH and ANDERSON, **Circuit Judges.**

Appeal from a judgment entered in the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, J., dismissing plaintiffs' claim for damages and ordering an injunction.

Dismissal of claim for damages affirmed and remanded to the district court with directions to vacate the injunction.

BENSON A. SNAIDER, Norwalk, Conn. (Abraham D. Slavitt of Slavitt & Connery, on the brief), for appellants.

JAMES W. MARSHALL, West Haven, Conn. (William F. Gallagher, on the brief), for appellees.

LUMBARD, Chief Judge:

Jimmie's Incorporated, owner of premises in West Haven, Connecticut, on which it conducts a restaurant devoted mostly to a drive-in, over-the-counter, short-order business, and Jimmie's Realty Corporation, which owns property across the street which is a sit-down restaurant, appeal from a judgment of the Connecticut District Court, of April 29, 1970, which dismissed their complaint in which they sought damages from the City of West Haven and the West Haven Development Agency for alleged interference with their business which they claim amounted to an unconstitutional taking of property, together with a prayer for a preliminary and a permanent injunction.

Prior to the hearing which resulted in dismissal of the complaint there was a hearing at which the parties stipulated that a preliminary injunction be granted. Accordingly, on December 12, 1969, Judge Blumenfeld signed an order enjoining defendants from interfering with the plaintiffs' relationship with their tenants, committing acts which will discourage the occupancy of plaintiffs' property, from warning plaintiffs not to develop and taking other action prohibiting the use, benefit and development of plaintiffs' property, until such time as the defendants shall acquire the plaintiffs' property under the laws of Connecticut.

Although the judgment of April 29, 1970 dismissed the complaint, it expressly provided that "the injunction entered in this case December 12, 1969, remain in effect pursuant to the terms thereof," and it went on to provide that "the complaint, insofar as it sets forth a claim for damages resulting from the conduct of the defendants prior to December 12, 1969, is dismissed for lack of jurisdiction."

It thus appears that the district court held that the plaintiffs had failed to show that what the defendants had done amounted to an unconstitutional taking of their property. With this we agree. But having found that there was no federal jurisdiction by reason of the failure of sufficient allegation and proof thereof, there remained no basis for continuing the injunction. Accordingly, we affirm that part of the judgment which dismissed the complaint and remand to the district court with directions to vacate the injunction of December 12, 1969.

The undisputed evidence shows that the controversy between Jimmie's and the City and its Redevelopment Agency goes back to 1960 when the Agency took measures for the redevelopment of part of West Haven which included plaintiffs' properties. Public hearings were held. The Agency purchased some properties in the redevelopment area, it demolished the structures on these properties, the occupants were advised to relocate and the defendants assisted them in doing so. The grade of a highway adjoining plaintiffs' property was raised and this resulted in some interference with access to one of the restaurants. On June 10, 1966, the City had adopted an urban renewal plan for the area, which is known as Savin Rock Urban Renewal Project No. 2.

At long last on October 31, 1966, West Haven authorized the acquisition of plaintiffs' property and negotiations ensued for the purchase of the plaintiffs' property until April 7, 1969 when the plaintiffs commenced proceedings in the state court which were thereafter withdrawn in August, 1969.

The complaint alleged that from on or about June 1960 until the filing of the complaint the defendants injured plaintiffs' business; that the defendants notified tenants occupying plantiffs' property that the City would acquire such property and encouraged them to relocate. Plaintiffs were not permitted to make major improvements to their property. They also alleged that, by diverting traffic and changing the grade in the road, the defendants interfered with the flow of traffic to their business.

At the hearing before the district court, on November 23, 1969, plaintiffs offered evidence that they lost considerable rental income as a result of the redevelopment plan. In 1967 a doughnut business, one of plaintiffs' tenants, left plaintiffs' property when it discovered the City's intention to acquire the property, and they were unable to acquire a suitable tenant as a replacement. Plaintiffs also offered evidence that in 1968 the Italian Villa, a restaurant which had paid them $5,000 a month rent, moved out because of the redevelopment plan and the best available replacement was a toy business which paid only $150 rent per month.

There was also some evidence that the plan may have had the effect of interfering with plaintiffs' ability to improve and further develop their property. Plaintiffs offered into evidence their contract with the Roma Construction Company entered into in 1961 before they were advised about the full scope of the redevelopment plan. The contract called for a clearing of a mound of earth from their property so that a new motel could be constructed there. They also alleged that they consulted an architect to draw up plans for the new motel. Part of the mound was removed, but plans for the new motel were abandoned when plaintiffs were informed that their land would be taken in the future for redevelopment purposes.

At the hearing the City offered evidence to establish that plaintiffs had conferred on numerous occasions with City officials in an attempt to have their properties excluded from the redevelopment area. The City was also able to establish that the income of plaintiffs rose desipte any adverse effects that the redevelopment plan may have had on them.

The owner president of plaintiff corporations, Salvtore Gagliardi, admitted in his testimony that the gross revenue of the corporations increased from eight or nine hundred thousand dollars in 1964 to one million one hunderd thousand dollars in 1968. Plaintiffs conceded that the business income grew every year after redevelopment had first been planned.

While Judge Blumenfeld made no findings, apparently because the parties stipulated and agreed to the provisions of a preliminary injunction which he signed on December 12, 1969, he granted the motion to dismiss the complaint on the

ground that any wrongs which the defendants may have committed were adequately compensated by damages which could be recovered under the state law.

While there may be such substantial interference with the enjoyment of property that it amounts to a tort for which some compensation is due the plaintiffs, it is clear that the facts which were alleged and shown to the district court in this case fall short of establishing a taking of sufficient dimension to justify the federal court in acting upon the complaint. **Danforth v. United States**, 308 U.S. 271 (1939), **Gardner v. Michigan**, 199 U.S. 325 (1905), **Mosher v. City of Boulder**, 225 F. Supp. 32 (D. Colo. 1964). All that is alleged and shown here is the kind of interference and minor harassment which frequently attends the public discussion and proceedings regarding the redevelopment of an area and the acquisition of the land required.[1]

The judgment of the district court insofar as it dismissed the complaint is affirmed. The case is remanded to the district court with directions to vacate that part of its judgment which continued in effect the injunction entered on December 12, 1969.

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[1] The **Foster** cases, cited by appellants, where federal courts found takings, are distinguishable since the decline in property value in those cases was much greater than in the instant case. **Foster v. Detroit**, 254 F. Supp. 655 (E.D. Mich. 1966); **Foster v. Detroit**, 405 F.2d 138 (6th Cir. 1968 ; **Foster v. Herley**, 207 F. Supp. 71 (6th Cir. 1964).

Appendix B

United States District Court
DISTRICT OF CONNECTICUT

JIMMIE'S, INCORPORATED and JIMMIE'S REALTY CORPORATION OF WEST HAVEN, INCORPORATED	
vs.	Civil No. 13,503
THE CITY OF WEST HAVEN and THE WEST HAVEN REDEVELOPMENT AGENCY	

JUDGMENT

This case came on to be heard by the court, the Honorable M. Joseph Blumenfeld, District Judge, presiding, and the issues having been duly tried and the court having rendered its decision on March 17, 1970, and having expressly determined that there is no just cause for delay and having expressly directed the entry of this final judgment, it is

ORDERED AND ADJUDGED that the injunction entered in this case December 12, 1969, remain in effect purusant to the terms thereof, that the complaint, insofar as it sets forth a claim for damages resulting from the conduct of the defendants prior to December 12, 1969, is dismissed for lack of jurisdiction, and that defendants have their costs of action.

Dated at New Haven, Connecticut, this 29th day of April, 1970.

GILBERT C. EARL
Clerk, United States District Court
By /s/ THOMAS A. SIMMS
Chief Deputy Clerk

FORM OF JUDGMENT APPROVED:
April 28, 1970.

M. Joseph Blumenfeld
United States District Judge

Appendix C

United States District Court

DISTRICT OF CONNECTICUT

JIMMIE'S, INCORPORATED and JIMMIE'S REALTY CORPORATION OF WEST HAVEN, INCORPORATED	
vs.	Civil No. 13,503
THE CITY OF WEST HAVEN and THE WEST HAVEN REDEVELOPMENT AGENCY	

RULING ON MOTION TO DISMISS

The plaintiff corporations, which own real estate in West Haven, brought this action praying for money damages, a temporary injunction and a permanent injunction against the City of West Haven and its Redevelopment Agency.

The complaint sets forth that commencing in June 1960, the Agency began to take the usual steps preparatory to the redevelopment of an area in West Haven which included the plaintiffs' property. Boundaries and limitations of the proposed redevelopment area where established and public hearings were held. Some properties other than the plaintiffs were acquired by purchase. Structures on such parcels were demolished; occupants, whether owners or tenants, were advised to relocate; and the defendants furnished financial assistance to them for that purpose.

The plaintiffs were advised to refrain from making any improvements on their properties, tenants of the plaintiffs were advised to move, and assistance to relocate them was given or offered. The grade of a highway adjoining part of the plaintiffs' property was raised, resulting in some interference with access to a portion of plaintiffs' property where a restaurant is maintained. It was not until October 31, 1966, that the defendant city authorized acquisition of plaintiffs' property. Negotiations between the parties for the purchase of plaintiffs' property by the defendant were not consummated and finally, on April 7, 1969, legal steps were taken. There-

after, on August 6, 1969, the state court proceedings were withdrawn. Conn. Gen. Stats. § 8-130.

The evidence offered at a hearing on the plaintiffs' separate motion for a temporary injunction indicated that the plaintiffs had consulted with city authorities in an effort to have their property excluded from the redevelopment area, and conditions under which that might be done were discussed.

It was not necessary for the court to make any findings because the parties stipulated that a preliminary injunction containing the following provisions agreed to by them should be entered:

> "[T]hat the Defendants, their agents, servants, employees, be and they hereby are restrained and enjoined from; interfering with the Plaintiffs' relationship with their tenants and especially those acts which will discourage the occupancy of Plaintiffs' property by tenants such as offering such tenants relocation assistance or by purchasing their business or stock-in-trade prior to the time of the acquisition of the Plaintiffs' property by governmental; and from warning Plaintiffs not to develop and taking other action prohibiting the use, benefit and development of Plaintiffs' property; until such time as the Defendants shall acquire Plaintiffs' property under the laws of the State of Connecticut or until further order of the Court."

Thereafter the defendants renewed their earlier motions to dismiss the complaint for lack of jurisdiction and to stay the action.

The Motion to Dismiss

The facts alleged in the complaint might be adequate to support the conclusory allegation that there was a taking of plaintiffs' property without payment of just compensation therefor in contravention of the fifth amendment to present a sufficiently substantial federal question to support jurisdiction under 28 U.S.C. § 1331. **See, e.g., Foster v. Herley,** 330 F.2d 87 (6th Cir. 1964); **Foster v. City of Detroit,** 254 F.Supp. 655 (E.D. Mich. 1966), **aff'd,** 405 F.2d 138 (6th Cir. 1968); **cf. Sayre v. United States,** 282 F. Supp. 175 (N.D. Ohio 1967);

R.J. Widen Co. v. United States, 357 F.2d 988 (Ct. Cl. 1966). Where the line of demarcation between acts which amount to the taking of an interest in property short of a transfer of title, as distinguished from acts resulting only in tortious interference with a plaintiff's rights in his property, is drawn in a case such as is presented here, requires a determination of whether.

> "the action of the Government has been such as to impose a servitude upon the property which interferes with the use, management, or enjoyment of the same. United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539; Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329, 43 S.Ct. 135, 67 L.Ed. 287; United States v. Causby, 328 U.S. 256, 66 S.Ct. 896, 90 L.Ed. 1004; United States v. Virginia Electric & Power Co., 365 U.S. 624, 81 S. Ct. 784, 5 L.Ed.2d 838." **Foster v. Herley, supra,** 330 F.2d at 90.

The conceptual difference between acts of interference with the use and enjoyment of a person's property by public officials which results only in a claim for damages, and those continuing acts which under all the circumstances ripen into a taking by the government of an interest in the property was discussed in **Foster v. Herley, supra.** A medley of continuing official acts may develop into so much interference with the owner's use and enjoyment of his property as to justify a finding that it was taken in advance of the formal transfer of title. It has been held in such a case that the taking occurs **at the time when** that persistent interfering conduct has an effect upon the value of the property. **Foster v. City of Detroit, supra,** 254 F.Supp. at 663-64. Thus, that is the time as of which just compensation for the taking is determined. **Id.** at 666-67, **aff'd** on this point at 405 F.2d at 147. **See also, Katz v. State,** Civ. No. 13,373, _____ F.Supp. _____ (D. Conn. Nov. 19, 1969).

Now that an injunction has been entered, the task of drawing the line between a "taking" of the plaintiffs' property and past conduct which interfered with the plaintiffs' full rights of enjoyment of their property has been accomplished. The plaintiffs no longer seek "just compensation" for the taking of their property. The injunction was designed to prevent the defendants from continuing the kind of conduct

which might ripen into a taking of the complete title or of any interest in the property. It is only when a government in fact makes regular or permanent use of that which would be wrongful to use unless it had acquired an interest in it that it must pay compensation based on the fair market value of the interest it took. **United States v. Miller,** 317 U.S. 369, 374 (1943). The full enjoyment of the complete rights in the plaintiffs' ownership of the property have now been protected against any future wrongful interference by the defendants.

No rights in the plaintiffs' property may be obtained by it unless it does so by exercise of the power of condemnation pursuant to the laws of the State of Connecticut.

While conduct consisting of tortious interference with an owner's use of his property is evidentiary on the issue of whether there has been a taking of an interest in the property for which compensation must be paid, the conduct of the defendants in this case had not ripened into a taking of any interest in it. The plaintiffs' property is not burdened with any servitude in favor of the defendants. Indeed, the plaintiffs do not want their property or any interest in it to be taken, and the defendants are now enjoined from unlawful conduct which might interfere with the plaintiffs' full use and enjoyment of their properties. All that remains is a claim for damages for earlier tortious interference with the plaintiffs' rights. The remedy for that wrong is damages, and whether the plaintiffs are entitled to recover any damages from those who may have acted tortiously presents questions of state, not federal, law.

Although a single group of facts may give rise to more than one claim for relief because more than one right has been violated, it does not follow that a federal court should entertain jurisdiction over all of the claims.

The claim for damages from conduct short of a "taking" does not rest on any federal ground, but is wholly independent of a claim for just compensation by reason of a "taking." What was said in **Hurn v. Oursler,** 289 U.S. 238, 248 (1933), by the Supreme Court in affirming a district court's dismissal of a nonfederal claim joined to another based on a federal

ground over which the court had exercised jurisdiction is applicable here:

> "From these averments two separate and distinct causes of action resulted, one arising under a law of the United States, and the other under general law. . . . [T]he latter is entirely outside the federal jurisdiction and subject to dismissal at any stage of the case. It is hardly necessary to say that a federal court is without the judicial power to entertain a cause of action not within its jurisdiction, merely because that cause of action has mistakenly been joined in the complaint with another which is within its jurisdiction."

Accordingly, insofar as the complaint sets forth a claim for damages resulting from the conduct of the defendants prior to December 12, 1969, the date of the injunction entered in this case, it should be dismissed, and it is

SO ORDERED.

Dated at Hartford, Connecticut, this 16th day of March, 1970.

M. JOSEPH BLUMENFELD
M. Joseph Blumenfeld
United States District Judge